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No. 94-612

# In the Supreme Court of the United States

OCTOBER TERM, 1994

MARJORIE K. JACKSON, PETITIONER

*v.*

JAMES A. SCHEIBEL, DIRECTOR, ACTION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the courts below properly found that petitioner failed to prove discrimination in the agency's choice of a male applicant to become Massachusetts state program director.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unreported, but the judgment is noted at 26 F.3d 126 (Table). The opinion of the district court (Pet. App. B1-B27) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on May 24, 1994. A petition for rehearing was denied on July 5, 1994. Pet. App. C1. The petition for a writ of certiorari was filed on October 3, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is a former employee of ACTION, a federal agency which until recently administered volunteer anti-poverty programs, such as VISTA and the Foster Grandparent Program. See 42 U.S.C. 4951, 5011, 5041 (1988 & Supp. IV 1992).[1]

ACTION's mission included assignment of its volunteers to projects "in the several States" at the "request of Federal, State, or local agencies, or private nonprofit organizations." 42 U.S.C. 4953(a). ACTION also awarded grants and contracts to state agencies and other nonprofit organizations to fund volunteer programs administered by those entities, see, *e.g.*, 42 U.S.C. 5001, 5011, 5013 (1988 & Supp. IV 1992), and provided them with technical assistance for the improvement of their programs, see 42 U.S.C. 4993 (Supp. IV 1992). The legislation dictated coordination and consultation with state and local programs and officials to promote the use of volunteer services. 42 U.S.C. 5050. Applicable regulations required joint state, local, and regional review of proposed ACTION initiatives. 45 C.F.R. 1233.1(b).

2. In 1981, petitioner was serving as Missouri state program director when a reduction in force (RIF) at ACTION displaced her from that position. Pet. App. B2. ACTION offered petitioner a slot as a volunteer

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[1] The Domestic Volunteer Service Act Amendments of 1993, Pub. L. No. 103-82, Tit. III, Subtit. B, 107 Stat. 898, instituted a major overhaul of the government's domestic volunteer efforts. As part of that reorganization, ACTION's functions were transferred earlier this year to the Corporation for National and Community Service. See National and Community Service Trust Act of 1993, Pub. L. No. 103-82, § 203(c)(2) and (d)(1)(B), 107 Stat. 892, 895; 59 Fed. Reg. 16,507 (1994).

recruiter, with retention of her GM-13 grade and pay level, but petitioner chose not to accept it and was separated from the agency. *Ibid.* Petitioner had the right to appeal the RIF-related separation, but declined to do so. *Id.* at B4.

3. In August 1984, ACTION announced an opening for the position of Massachusetts state program director, level GM-301-13, which entailed directing all ACTION projects within the State of Massachusetts and required "the ability to communicate with state and local governments and agencies in Massachusetts, as well as 'organizations of business, labor, senior citizens, the poor, community services and volunteer groups.'" Pet. App. B8 (quoting ACTION Vacancy Announcement). Petitioner, who had not worked at ACTION since her 1981 separation, applied for this position.

The applications of five candidates (including petitioner) came before the selecting official, Daniel Bonner, ACTION's associate director for domestic operations. Pet. App. B7. On the basis of the SF-171 personal qualifications statement and accompanying merit promotion appraisal form submitted by each candidate, Bonner selected William Cosby. *Id.* at B8. At the time, Cosby had nine years and nine months' experience at ACTION in its Boston, Massachusetts, office. *Id.* at B10; see also Pet. 6. Since June 1984, Cosby had served as acting state program director for Massachusetts; prior to that, he was a state program specialist for Massachusetts, developing ACTION programs for the State and learning the workings of the state and local governments. Pet. App. B10, B17. Cosby's application materials demonstrated that he was well informed about the current economy and programs in Massachusetts,

and also reflected what Bonner called a "rather remarkable" depth of community spirit. *Id.* at B17-B18.

According to ACTION's director for the region that included Massachusetts—an individual who was Cosby's present and former supervisor and who supplied Cosby's appraisal ratings—Cosby had performed "exceptionally" in all seven rated categories. Pet. App. B5, B9-B10. The categories included knowledge of principles and practices of supervision and ability to supervise a staff of three to five; ability to identify, analyze, and develop solutions to problems; ability to develop and carry out long- and short-range goals and objectives; experience reviewing and evaluating work performance of individuals or an organization for accuracy and conformance to guidelines; skill in analyzing needs and in developing and presenting information for an intended audience; knowledge of budget development and management; and skill in public speaking and in relating to the public. *Id.* at B9.

Years earlier, petitioner had worked in Massachusetts for 17 months as a program field analyst for an ACTION predecessor agency. Pet. App. B5. She had also served for seven years and nine months in the Missouri state program director post. *Ibid.* Petitioner's appraisal form for the Massachusetts directorship application was completed by the former regional deputy director for the region that included Missouri, an individual who had retired from ACTION in 1982. *Id.* at B4, B9. He rated petitioner "exceptional" in the first five categories and "above average" in the other two categories. *Id.* at B9.

Following Bonner's determination that Cosby was the best qualified candidate for the position of Massachusetts state program director, petitioner charged ACTION with sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c).

4. The district court conducted a full bench trial, and issued comprehensive findings of fact and conclusions of law. Pet. App. B1-B27. The court ruled that petitioner had stated a prima facie case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). Pet. App. B14-B15, B17. That is, petitioner had demonstrated that she is a member of a class (females) protected under Title VII; that she applied for and was qualified for the position at issue; that she was rejected; and that the position remained open while ACTION sought other applicants with petitioner's qualifications. *Id.* at B17. Proceeding to the second stage of the *McDonnell Douglas* analysis, the court determined that ACTION had articulated a legitimate, nondiscriminatory reason for its employment decision, *i.e.*, Cosby was better qualified. *Id.* at B17-B18; *McDonnell Douglas*, 411 U.S. at 802-803.

Finally, the court considered, in accordance with *McDonnell Douglas*, whether petitioner had "prove[d] by a preponderance of the evidence that the proffered reason was pretextual and that ACTION intentionally discriminated against [petitioner] because of her sex." Pet. App. B18; *McDonnell Douglas*, 411 U.S. at 804-805. The court held that petitioner's charge of pretext was "unsupported by the evidence and without merit." Pet. App. B20. Accordingly, the district court ruled in favor of ACTION.

5. The court of appeals affirmed in a per curiam, unpublished opinion (Pet. App. A1-A2), holding that the district court's findings "in this fact-intensive case * * * are not clearly erroneous" and that the district court committed no error of law. *Id.* at A2.

## ARGUMENT

Petitioner contends that the courts below erred in concluding that ACTION had a legitimate reason for choosing Cosby as the new Massachusetts state program director. Pet. 11-20. While conceding that Cosby had far more experience with ACTION in Massachusetts than she (Pet. 6), petitioner maintains that that fact is not "legally sufficient" (Pet. 14, 16) to justify his selection.

The district court correctly applied the framework established by this Court in *McDonnell Douglas*, and the court of appeals' affirmance of its "fact-intensive" ruling (Pet. App. A2) creates no conflict with any decision of this Court or another court of appeals. Petitioner's argument essentially consists of challenges to the district court's factual findings.

1. The district court concluded at the threshold that petitioner had made out a prima facie case of sex discrimination (Pet. App. B17), and it correctly proceeded to consider whether ACTION's proffered explanation for selecting Cosby over petitioner was legitimate and nondiscriminatory. *Id.* at B17-B18; see *McDonnell Douglas*, 411 U.S. at 802-803; *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981).

The court assessed Cosby's qualifications against the vacancy announcement. Consistent with ACTION's mission to allocate federal funds, volunteers, and technical assistance among state and local governments and community organizations, the announcement called for a person who could direct ACTION's efforts in Massachusetts and maintain contact with governments, agencies, and community organizations in that State. Pet. App. B8. On the evidence, the district court agreed with ACTION that Cosby's work as state program specialist developing programs in Massachusetts gave

him expertise in the workings of Massachusetts' local governments and in its current economy, and thus amply qualified him to be the State's program director. *Id.* at B18. The court had before it Cosby's perfect performance appraisal, prepared by ACTION's regional director, an individual well-versed in the needs of the Massachusetts ACTION organization (*id.* at B5, B9-B10, B11); and the court particularly noted Bonner's testimony that Cosby showed a "rather remarkable" depth of community spirit. *Id.* at B18.

This Court has held that "under *Furnco* [*Construction Corp.* v. *Waters*, 438 U.S. 567 (1978)] and *McDonnell Douglas* the employer's burden is satisfied if he simply 'explains what he has done' or 'produc[es] evidence of legitimate nondiscriminatory reasons.'" *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24, 25 n.2 (1978) (per curiam) (citation omitted). The district court correctly concluded that ACTION had met its burden under this standard by adducing evidence that showed that "ACTION exercised its discretion to pick the candidate it believed was the best qualified." Pet. App. B18. This evidence of a neutral reason was "legally sufficient to justify a judgment for the defendant." *Burdine*, 450 U.S. at 255.

2. Having found that ACTION met its burden of stating a neutral reason for Cosby's selection, the district court properly turned to petitioner's claim that ACTION's reason was a pretext for discrimination. See *St. Mary's Honor Ctr.* v. *Hicks*, 113 S. Ct. 2742, 2747 (1993); *Burdine*, 450 U.S. at 253; *McDonnell Douglas*, 411 U.S. at 806. In concluding that the evidence did not establish pretext, the district court analyzed in detail

the very factual claims petitioner now reiterates in this Court.[2]

a. The district court explicitly rejected petitioner's claim (Pet. 13) that her qualifications were "far superior" to Cosby's due to her longer tenure in grade GS-13, as a state program director in Missouri, and with ACTION generally. The court found no indication that any of those factors was relevant to the requirements of this particular job. Pet. App. B19. Moreover, the court noted that petitioner's state program director experience had been in a different region and had ended three years earlier. *Ibid.* The court also found that the fact that petitioner was eligible to avoid competitive examination for the job, while Cosby was not, had no bearing on the candidates' relative competence, but was simply a reflection of petitioner's longer GS-13 service. *Id.* at B20.

b. The court rejected petitioner's claim (Pet. 13) that females were underrepresented as state program directors, noting that petitioner's statistics were premised on an applicant group consisting of all female GS-11s and GS-12s, rather than those women who actually were eligible to apply for state directorships, and that petitioner did not establish the number of state

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[2] Petitioner's catalog of "undisputed evidence" (Pet. 13) is misleading. While certain facts—such as petitioner's longer tenure as a state program director—were undisputed, the inferences to be drawn from those facts were very much in dispute. The relevant question at trial was whether ACTION legitimately could determine that Cosby was better qualified for the specific position at issue here; and the district court's careful analysis led it specifically to reject petitioner's claim (*ibid.*) that her qualifications were "far superior to Cosby's" for the Massachusetts directorship.

directorships filled during the relevant period. Pet. App. B23-B26. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 339 n.20 (1977) (sample size and composition of "pool of qualified job applicants" relevant to utility of statistical evidence); *Palmer* v. *Shultz*, 815 F.2d 84, 91 & n.6 (D.C. Cir. 1987) (to be meaningful, statistical evidence must compare relevant labor pools). Similarly, the court found no violation of the agency's affirmative action policies (see Pet. 13), since the affirmative action plan for the relevant period did not show an underrepresentation of women or establish goals for women in the state directorship series. Pet. App. B24.

c. The court found petitioner's charge (Pet. 13) that Cosby was pre-selected and groomed for the job to be "speculative at best" (Pet. App. B20), and saw no evidence that Cosby's stint as acting state program director gave him any competitive advantage. *Id.* at B20-B21. The court also rejected petitioner's allegation (Pet. 13) that her application was not seriously considered, finding it "of no moment" that Bonner, formerly the selecting official for all of Massachusetts, did not recall much about this particular episode when he testified at trial eight years later. Pet. App. B21-B22. While petitioner protests the "subjective" choice made here by a male selecting officer (Pet. 13), the court found that Bonner, sitting in Washington, D.C., followed his regular practice of evaluation based solely on the candidates' SF-171 and appraisal forms, without personal interviews. Pet. App. B8.[3]

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[3] At trial, ACTION questioned petitioner's eligibility for the Massachusetts position, based on its interpretation of the phrase "area of consideration" in the vacancy announcement. Pet. App.

d. The district court also considered and rejected petitioner's claim (Pet. 9-10) of a pattern of discrimination against her, beginning with the 1981 RIF. The court found that 200 people in the agency were displaced in the 1981 RIF, including two male state program directors and two female state program directors. Pet. App. B22. The court observed that it was the male regional deputy director, and not petitioner, whose position was abolished and who then "bumped" petitioner; there was no showing that ACTION had eliminated his job in order to injure her, the court found. *Id.* at B22-B23.

As for petitioner's related complaint (Pet. 9-10) that she was not reinstated upon the retirement of the man who had replaced her, the district court found that, pursuant to 5 C.F.R. 7.1, ACTION was under no obligation to fill the vacancy, and that the agency had decided to add the Missouri state program director's duties to those of another state program director. Pet. App. B23. The court noted that petitioner had rejected the alternative position offered her in 1981 at the same grade and pay; had not appealed her RIF-related separation; and had not filed a discrimination charge in 1982 when the Missouri director's duties were transferred. Pet. App. B4, B5.[4]

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B15-B16. The district court disagreed with the agency's reading of the phrase and found that petitioner had been eligible to apply. *Ibid.* Nothing in the court's decision or elsewhere supports petitioner's assertion (Pet. 11, 14) that the agency raised eligibility in an effort to "cover up" a discriminatory selection or that petitioner was not in fact considered for the Massachusetts post.

[4] Petitioner did allege discrimination before the Merit Systems Protection Board after the Missouri directorship remained unfilled, but her action was unsuccessful. Pet. App. B5.

In short, the district court, having heard all the evidence and the arguments of the parties, performed its task of "decid[ing] which party's explanation of the employer's motivation it believe[d]." *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983). The foregoing factual findings, which the court of appeals determined were not clearly erroneous, justified the district court's conclusion that petitioner had failed to demonstrate pretext or intentional discrimination by a preponderance of the evidence. See *Hicks*, 113 S. Ct. at 2756 ("trial courts [and] reviewing courts should treat discrimination [no] differently from other ultimate questions of fact") (quoting *Aikens*, 460 U.S. at 716).

3. Petitioner appears to argue nonetheless that some new analysis, outside the contours of *McDonnell Douglas*, *Burdine*, and *Hicks*, should be developed for this case because the selecting official took account of Cosby's long service in Massachusetts. She contends that this reason, even if true, is "irrational" and therefore should support a finding of discrimination. Pet. 14-20.

In fact, neither the selecting official nor the district court named Cosby's Massachusetts service per se as the reason for his appointment. What both Bonner and the court cited were the familiarity Cosby's work had afforded him with the governmental entities, programs, and economy of Massachusetts; his outstanding community spirit; and his stellar performance ratings. Pet. App. B17-B18. The evidence convinced the courts below that it was proper for ACTION to weigh these factors more heavily than those emphasized by

petitioner, such as longer agency tenure.[5] Given the nature of the responsibilities involved in the Massachusetts position (see Pet. App. B8), it cannot be said that Cosby's qualifications and selection were not "reasonably related to the achievement of some legitimate purpose." *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 578 (1978).[6] Thus, there is no cause

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[5] Petitioner's argument amounts to a request that this Court dictate what criteria and qualifications ACTION should consider when selecting state program directors. This request runs afoul of *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978), in which this Court recognized that "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Id.* at 578. All the employer must demonstrate is "a justification which is reasonably related to the achievement of some legitimate goal." *Ibid.* ACTION has met that burden here, and petitioner's failure to demonstrate pretext ends the inquiry. See *ibid.*

[6] Petitioner's insistence that it would be "irrational" for ACTION to have chosen Cosby on the basis of his longer service in Massachusetts may amount to an argument that ACTION's claimed reliance on that factor is unworthy of credence, and that petitioner therefore is entitled to judgment. This argument should be rejected for two reasons. First, the district court, sitting as factfinder, was uniquely able to assess credibility, and it deemed ACTION's justification credible. See *United States* v. *Oregon State Medical Soc'y*, 343 U.S. 326, 332 (1952) (recognizing command of Fed. R. Civ. P. 52(a) that "due regard shall be given to" trial court's opportunity to judge witness credibility). Second, this Court in *Hicks* made clear that if the trier of fact disbelieves the employer's justifications, judgment for the plaintiff is *permitted*, but is not *required*. 113 S. Ct. at 2749. The plaintiff "at all times bears the ultimate burden of persuasion" as to intentional discrimination, and rejection of the employer's justification does not necessarily mean that that burden is satisfied. *Ibid.* (internal quotation marks omitted).

for review of the district court's factual findings, much less for the creation of a new legal construct.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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